Making the Angels Weep

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This article was originally written for the Journal of the United Lawyers Association of India *and is published here by agreement with that Journal.* *The article is concerned with a Supreme Court of India decision on judicial appointments and the meaning to be given to the word "consultation" in the Indian Constitution. The article compares the Indian decision with a decision of the New Zealand Court of Appeal and the Western Samoa Court of Appeal. The article concludes by suggesting that the judiciary has a part to play in helping to create constitutional conventions, and not merely in expounding them.*

The President of the United Lawyers Association is a most persuasive advocate, and as persistent as he is persuasive. He is also a friend, from a common connection with the London-based organisation Interights. So it is that I find myself making a brief contribution to the inaugural issue of the Association's Journal, as well as sending best wishes from afar for the success of the Journal and the continued success of the Association.

The decision in 1993 of the Supreme Court of India in *Supreme Court Advocates-on-Record Association v. Union of India* attracted the attention of jurists throughout the world. It might be thought presumptuous and intrusive for an outsider from as distant a country as New Zealand, with regrettably little first-hand knowledge of the great country of India or its legal system, to offer any comments on such a decision. At the outset the limitations of my knowledge must be fully confessed. But occasionally a totally detached reaction may be not without some marginal relevance. So, for what if anything they may be worth, here are the impressions left on me by a reading of the judgments delivered by or concurred in by the nine members of this highly respected Court.

The copy that I have is the report in the 1993 (Supplement) Scale published by the Supreme Court Almanac. It was kindly sent by another friend, one indeed of longer standing in that respect than Soli Sorabjee.

The Attorney-General for India, Milon Banerji, and I were up at Cambridge in the same College (Clare) together, rather long ago: in the early nineteen-fifties. It

has been a pleasure to renew our friendship recently. In his letter accompanying the judgments he not unnaturally commended the "strong minority view expressed by the next Chief Justice of India, Justice Ahmadi, who upheld my contentions". But Banerji AG then went on to speculate. He said "perhaps, the majority judgment may have your approval".

The reason for that tentative view may have been awareness that I am a committed supporter of the rule of law, with a particular interest in constitutional and administrative law. But possibly and unsurprisingly my old friend is not closely familiar with my judicial approach. In the event I find myself on his side and that of Ahmadi J. Their reasoning appeals to me as irresistible. That is said without any vestige of disrespect for the views of the majority. One transcending impression of the majority judgments — no less applicable, though, to the minority judgment — is of their dedication to judicial independence as a key value in its own right and as an essential ingredient of any democratic polity. The Sovereign Socialist Secular Democratic Republic of India, to quote the words (as augmented in 1976) of the Preamble to the Constitution, is fortunate that its judicial arm so strongly embraces fundamental principles.

The central points in the *SCAORA* case were very simple. Article 124(2) of the Constitution provides, so far as relevant —

> (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.
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> Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

Article 217 provides, so far as relevant:

> **217. Appointment and conditions of the office of a Judge of a High Court** — (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court

Article 222(1) provides:

> **222. Transfer of a Judge from one High Court to another** — (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

The issue was whether "consultation" in those provisions means "concurrence". In essence, it would seem to have been a question no more complicated than that; but its starkness can be and was decently disguised by more abstract formulations, such as whether the opinion of the Chief Justice of India is entitled to primacy. More symbolically, Solomon's throne and the supporting lions referred to by Bacon were among the figures of speech deployed. In *S P Gupta v. Union of India* 1982 (2) SCR 85, where Bhagwati J (as then was) delivered the main judgment, a Court of seven Judges had held by a majority of 4 to 3 that the Chief Justice's opinion did not enjoy primacy, and by a majority of 6 to 1 that on a plain reading of Article 222(1) it could not be argued that the consent of a Judge proposed to be transferred is a sine qua non. On the latter point Bhagwati J had adhered to his view previously expressed judicially that the requirement of consent must be read into the Article to protect the independence of the judiciary.

In his judgment in the instant case, Pandian J speaks of a "chorus of protest" against the majority decision in *Gupta*, saying also that its reconsideration was necessitated by "the opinion of some learned outstanding Judges here and elsewhere, eminent jurists and the Law Commission". Hence, the reference to a nine-Judge bench. To a distant observer this is surprising; and it is still more surprising to find that the judgments after the reconsideration extend to 169 closely-printed pages. Punchhi J speaks of the Indian Constitution as "perhaps the longest in the world, a document written profusely. There is no miserliness employed in the use of words". Similar remarks might be made about the judgments, yet not without adding that their richness and breadth are patently redeeming features. To Punchhi J's final rhetorical question "Was it worth it?", a possible answer is that nothing which so massively underlines the value of judicial independence can be dismissed as a waste of time and energy.

In any ordinary context, including administrative law contexts, the meaning of "consultation" is tolerably clear. In the New Zealand Court of Appeal we had to consider the word in *Wellington International Airport Ltd v. Air New Zealand* [1993] 1 NZLR 671. The case concerned a statutory duty of an airport company to consult with airlines before fixing charges for the use of the airport. We were referred by counsel, just as the Indian Supreme Court was referred, to leading English authorities such as *Port Louis Corporation v. Attorney-General of Mauritius* [1965] AC 111, and to the proposition in the Privy Council judgment delivered by Lord Morris of Borth-y-Gest that the nature and object of consultation must be related to the circumstances which call for it. In a unanimous judgment delivered by my colleague McKay J, our Court said:

> We readily accept Mr Fardell's submission that one of the purposes of requiring con-

> sultation was to place some restraint on the airport company, which would be in a monopoly position as the only provider of airport facilities in Wellington. The airport charges had previously been fixed by statutory regulations, and we were told that they are similarly controlled in virtually all other countries. The obligation to consult can be seen as providing some protection to the airlines and to the public against an abuse of monopoly power. Other constraints are the fact that the airport company is dependent for by far the greater part of its revenues on the three major airlines, that it is a public utility whose charges are eventually passed on to the public, and the fact that if it were to act irresponsibly it would be open to the Government to impose price control under section 53 of the Commerce Act 1986.
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> From this base, however, Mr Fardell went on to submit that the object and purpose of the consultation obligation could be stated as an opportunity to allow the airport users to negotiate a level of charges that ensured that the monopoly position which the airport company occupied was not being abused. He submitted that the context of the obligation could be stated as "an ongoing dialogue of such quality that it can readily be described as negotiation based upon information transparency which involves the airport company making available all information which it is necessary for the airport users reasonably to satisfy themselves that the airport company's position is not being abused".
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> We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses. The process is quite different from negotiation, however. One cannot expand the statutory requirement by replacing the word "consultation" with "negotiation" and then importing into the section the very different meaning of the latter word.

Up to a point the view expressed in that passage harmonises with parts of the judgments in the judicial appointments case. For instance, Pandian J there adopts statements in earlier cases by other Indian Judges on the lines that "consultation" requires that all the material in the possession of one who consults must be unreservedly placed before the consultee: he cannot keep facts up his sleeve. I fully agree, and believe that my colleagues would also agree. Whether in fact adequately wide and unreserved consultation takes place in New Zealand before appointments to high judicial office are made by the Governor-General on Ministerial advice is a different question. The description of New Zealand practice given in the judgment of Ahmadi J is not one

that I recognise. The learned Judge does not name his source.

Proposals are on foot for a more structured form of consultation but the New Zealand Government does not appear to be attracted to the idea of a Judicial Commission charged with the function of recommending appointments. We lag behind India in the sense that there is no statutory duty of consultation, let alone a constitutional one, nor at present even a convention that can be defined with any precision. So the surprise with which one reads the majority judgments in the Supreme Court is coupled with a degree of envy. It should be added, however, that by and large the ideal of judicial independence has been respected in New Zealand in the past, at least in principle. There have been no flagrantly political appointments. Subtleties of political preference between reasonably qualified candidates can of course arise. And pressures for judicial decisions in a certain direction (in sentencing for example) are probably increasing through the conjoint effects of political and media opportunism and current notions of accountability. No doubt the tendency is world-wide.

The striking point, though, is not that India is ahead, but the overwhelming extent of its lead. "Consultation" has been held to mean "concurrence" and the judicial techniques employed in reaching that result must deserve close scrutiny. Perhaps it is sufficiently obvious that in ordinary contexts the two words are quite different in their senses. If so, the issue becomes whether in the context of a constitution, construed as a living and developing instrument and permeated by powerful ideas such as the separation of powers, the vital word may be perceived to bear a special meaning.

The old inhibitions against looking at reports of Parliamentary debates in interpreting statutes have been abandoned for some time in New Zealand and Australia, and now in the United Kingdom also since *Pepper v. Hart* [1993] AC 593. But ordinarily resort to Hansard[1] is not encouraged, for it is time-consuming and often unproductive, and it can add to the cost of litigation. Varying reservations are expressed about when it is permissible. Certainly very few Judges, if any, would agree that it could be permitted for the purpose of rejecting an interpretation clearly required by the terms of an Act construed in the light of the apparent statutory purpose. Similar reservations do not apply, at any rate with the same force, to references to the proceedings of an assembly in the evolution of a constitution. Again they may be inconclusive, but to disregard them would surely be irresponsible. So it is that the Supreme Court judgments, of both the majority and the minority, draw on the historic debates of the Constituent Assembly.

[1] Hansard is the traditional name of the transcripts of Parliamentary debates in Britain and many Commonwealth countries. It is named after Thomas Curson Hansard, a London printer and publisher, who was the first official printer to the Parliament at Westminster.

In that respect, but in that respect only, the case is reminiscent of one in which, with two other New Zealand Judges, I sat in 1982 to constitute a Court of Appeal in Western Samoa. That South Pacific country's judicial resources usually do not enable an appellate Court to be composed of resident Judges, and New Zealand provides this form of help from time to time. The case is *Attorney-General of Western Samoa v. Saipai'ia Olamalu*, reported in (1984) 14 Victoria University of Wellington Law Review 275. When Western Samoa attained independence after the second world war, a condition laid down by the United Nations was the adoption of a written constitution guaranteeing human rights. One provision in the resultant Constitution is that all persons are equal before the law; there are other anti-discrimination provisions. Compare Articles 14 and 15 of the Indian Constitution. Constitutional instruments commonly deal with the suffrage for parliamentary elections as a distinct and separate subject, as do Articles 325 and 326 of the Indian Constitution with their provisions respecting adult suffrage.

Significantly, the Western Samoa Constitution made no provision for universal suffrage but did provide for separate rolls for territorial constituencies and individual voters, thus impliedly envisaging continuance of the existing system whereby the *matai* or elected family heads voted for local members and the population of non-Samoan origin voted on the roll for individuals. In that context, applying the principles of interpretation both generous and sui generis stated by Lord Wilberforce in his famous Privy Council judgment in *Minister of Home Affairs v. Fisher* (1980) AC 318, the Court held that equality before the law was not intended to extend to voting rights. Thereby we reversed the decision of the (Australian) Chief Justice. But I am happy to say that, possibly to some extent in response to a concluding hint in our judgment, the Samoan legislature has now introduced fully democratic suffrage. The judiciary can influence change without imposing it.

The reason why that case comes to mind is that on examining the debates in the Convention which adopted the Western Samoa Constitution we found that after a lengthy debate the Convention had rejected an amendment providing for universal adult suffrage. To shut our eyes to that rejection, to refuse to consider it even as an aid to interpretation, seemed to the Court artificial. It lent strong support to the conclusion that we were prepared to reach without it.

At this stage the comparison with India breaks down. In the Indian Constituent Assembly, amendments were proposed specifically requiring the *concurrence* of the Chief Justice of India for high judicial appointments. They reflected the recommendation of the Body of Judges. But they were defeated. Granted that the meaning of the Constitution can evolve with time, it is still not easy to see how in less than half a century "consultation" as the term presumably must have been understood by

the Constituent Assembly has been transmuted into "concurrence". Nor would it seem easy to find in the majority judgments convincing reasons for circumventing the difficulty. One must not overlook the use made by Punchhi J of a recorded remark of Dr BR Ambedkar in the final Assembly debate:

> To allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day.

Whether those few words of political argument, unelaborated upon by their speaker, can bear the weight sought to be attached to them forty years and more on is a question upon which it will be better for an outside observer to refrain from an opinion.

But the debates in the Constituent Assembly are of secondary importance. In the end what must be in the forefront are the terms of the Constitution itself, interpreted in the spirit recommended by Lord Wilberforce to whose approach I have often expressed judicial allegiance. Here the judicial appointments case calls for primary focus on the judgment of J S Verma J, generally concurred in as it was by the majority Judges; although Punchhi J vigorously — and tellingly — dissented from the view that "the Chief Justice of India" should be taken to mean the latter after taking into account the views of the two seniormost Judges of the Supreme Court. Another separate judgment was that of Kuldip Singh J, who agreed with the majority on primacy and on consultation of the two most senior Judges but held that the Chief Justice of India should be appointed on the basis of selection by merit and that the seniority alone rule should not apply.

It is then to the judgment of JS Verma J that we should look for the actual decision of the case. Its most striking feature is the enunciation of a set of 14 numbered conclusions. They begin with stress on the need for a participatory consultation process, a concept with which few would quarrel. Prominent among the other conclusions are the rules that *invariably* appointments to the Supreme Court must be initiated by the Chief Justice of India, appointments to a High Court must be initiated by the Chief Justice of that Court, and transfers of Judges of High Courts must be initiated by the Chief Justice of India. No appointment of any Judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of the Chief Justice of India. The latter rule is subject to a limited exception "for stated strong cogent reasons", but if these are not accepted by the Chief Justice and his consulted colleagues the recommended appointment should be made "as a healthy convention". That is the only appearance of the word "convention" in the concluding summary.

There are several such references in the main part of the judgment. It is not entirely clear how far the judgment is merely proposing conventional norms.

The judgment also speaks of very limited judicial review and justiciability; but the justiciability envisaged extends to transfers without the recommendations of the Chief Justice of India, and also to reviews of Judge strength. Moreover a timetable for the performance of functions is laid down, as is a requirement to record consultations in writing. To some extent at least, therefore, the rules appear to be propounded as more than conventions. A further specific rule propounded is that appointment to the office of Chief Justice of India should be of the seniormost Judge of the Supreme Court considered fit to hold the office. There the word "should" is more suggestive of a convention, but the same can hardly be said of "The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices".

Analysis of the judgment brings out, I think, five main reasons given to justify the propounded rules:

1. Under the Government of India Acts, high judicial appointments were in the absolute discretion of the Crown. By contrast the obligation of consultation was imposed by the Constituent Assembly to safeguard judicial independence. The comment is inevitable that this seems scarcely to justify reading "consultation" as "concurrence".
2. Usually the Chief Justice is best suited to know the worth of a prospective appointee. The same comment has to be made.
3. In England by convention the Prime Minister in advising the monarch on certain high judicial appointments departs from the advice of the Lord Chancellor only in the most exceptional case. The comment has to be that the analogy would be helpful in the evolution of an Indian convention, but not in formulating a legal rule.
4. Articles 121 and 211 of the Constitution preclude discussions in Parliament with respect to the conduct of Judges, except upon motions for removal; real accountability lies with the Chief Justices, who will have to bear the brunt of the criticism of "the ever-vigilant Bar". The apparent implication is that the Indian Bar would be prepared to criticise a Chief Justice for an appointment for which he had no responsibility.
5. The President is required by Article 74(1) to act in accordance with the advice of the Council of Ministers, but that advice must be given in accordance with Articles 124(2) and 217(1) as construed by the Court. As to this reason, if the Court's construction is correct, so much would presumably follow.

With the utmost respect, when the foregoing reasons are placed alongside the ordinary meaning of "consultation" many lawyers and many ordinary readers would probably not see them as adequate to change the meaning of that word to "concurrence". In truth the task is Herculean. Verma J quotes from *Measure for Measure* the well-known adage that it is excellent to have a giant's strength, but tyrannous to use it like a giant. Shortly afterwards the rather odious Isabella ("More than our brother is our chastity") said something equally well-known:

> ... but man, proud man,
> Drest in a little brief authority,
> Most ignorant of what he's most assur'd,
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven
> As make the angels weep; who, with our spleens,
> Would all themselves laugh mortal.

Happily the Judges making up the majority in the judicial appointments case enjoyed in fact authority neither little nor brief, but perhaps the rest of the quotation could not so easily be dismissed as inappropriate.

Yet I do not end on a note of criticism. As held by the majority of the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, recognising and giving precision to constitutional conventions is a legitimate function of the Courts. Despite the proffered evidence that of 547 appointments to the higher Indian judiciary in the decade ending in 1993 only seven were not in accord with the opinion of the Chief Justice of India, it may be assumed that some genuine apprehension underlay the deliberations of the Judges and the arguments of counsel in *SCAORA v. UOI*. The majority of the Court may have gone too far, if their conclusions be viewed as an interpretation of the Constitution intended to be binding in law. but the judicial arm of the state has a part to play not merely in expounding conventions, but in helping to create them. The decision of the majority will no doubt have at least that tendency in India itself. And the overall impact of their decision is a blow struck for the principle of judicial independence that will be felt in India only. However vulnerable in detail, it will surely always be seen as a dramatic event in the international history of jurisprudence.